88-1643

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term

WILLIAM E. STEPHENSON,
Petitioner

v.

MCLEAN CONTRACTING COMPANY, INCORPORATED
Respondent

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURTS OF APPEALS
FOR THE FOURTH DISTRICT

PETITION FOR WRIT OF CERTIORARI

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53 pp

QUESTIONS PRESENTED FOR REVIEW

Whether or not the Fourth Circuit Court of Appeals committed error when it created a new test to determine as a matter of law whether Plaintiff was a "seaman or member of crew" within the meaning of the Jones Act when that new test is not only inconsistent with the Supreme Court's holdings on the subject as well as with other Circuits, but also establishes an ambiguous and confusing Jones Act standard, when applied to a member of the crew of special purpose vessels, which in essence denies an injured party a right to trial by jury.

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OPINIONS BELOW

The December 23, 1988 opinion of the United States Court of Appeals for the Fourth Circuit, whose judgment is herein sought to be reviewed, is not yet officially reported and is included in the appendix at A-1. The order from the United States Court of Appeals for the Fourth Circuit denying rehearing is included in the appendix at A-20.

The prior opinion of the United States District Court for the District of Maryland is unreported and is included in the appendix at A-10.

JURISDICTION

The judgment of the United States District Court for the District of Maryland was entered on April 20, 1988. The order of the United States Court of Appeals for the Fourth Circuit affirming the judgment of the trial court was entered on December 23, 1988. A petition for rehearing was denied by the Court of Appeals for the Fourth Circuit on February 2, 1989. The jurisdiction of the Supreme Court is invoked pursuant to 28 U.S.C Section 1254(1).

STATUTE INVOLVED

The statute involved is 46 U.S.C. Section 688 (a), commonly known as the Jones Act:

Section 688. Recovery for injury to or death of seaman

(a) Application of railway employee statutes; jurisdiction. Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statues of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

STATEMENT OF THE CASE

Petitioner, William Stephenson, was hired by Respondent, McLean Contracting Company in September, 1985 to work at a bridge construction site. Stephenson was regularly assigned to work on the Annapolis, a crane barge (also known as a bucket dredge), used to construct the pilings of the bridge. Stephenson performed approximately 80% of his labor on the Annapolis. On March 26, 1986, the day of his injury, he was assigned to work on the Newport News, a vessel similar to the Annapolis. Following the orders of that vessel's supervisor, Stephenson was assigned to work inside a cofferdam. (A cofferdam is a box-like structure constructed in the Choptank River built to keep water out of the work area to allow pilings to be placed in the

river bottom.) Stephenson sustained serious injuries inside the cofferdam when he slipped on some gravel on a beam and fell onto the concrete floor of the cofferdam.

Stephenson filed suit in the United States District Court for the District of Maryland. The Complaint alleged that he was a seaman entitled to remedies under the Jones Act and also alleged the unseaworthiness of the Newport News. Trial commenced on April 11, 1988, and during the plaintiff's case-in-chief, summary judgment was granted in favor of McLean Contracting Company.

The Plaintiff appealed the District Court's judgment to the Court of Appeals for the Fourth Circuit. The judgment of the District Court was affirmed by the Circuit Court of Appeals for the Fourth

Circuit on December 23, 1988. A rehearing was denied by the Court of Appeals on February 2, 1989.

REASONS FOR GRANTING WRIT

The Petition for Writ of Certiorari raises issues that are of great importance to all employees involved in maritime work in the United States, on special purpose vessels, (dredges, barges, scows, derricks, crane barges, carfloats, and other special purpose vessels) on navigable waters. The question of whether a seaman or member of a crew that is working on a special purpose vessel is covered by the Jones Act goes beyond the litigants of this case and directly affects thousands of employees in all geographic areas of the United States.

The undersigned counsel, for example, presently has five similar cases pending in the United States District Court for the District of Maryland.

Certiorari should also be granted to resolve conflicting standards among the lower courts for determining coverage under the Jones Act.

Also guidance is needed from this Court to determine what effect the 1972 Amendment to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. section 901, et seq. has on the test to be applied in determining who is a seaman or member of the crew for coverage under the Jones Act.

This Court should grant this Petition because the decision of the Court of Appeals for the Fourth Circuit conflicts not only with decision of the other federal circuits, but also with decisions by this Court and its own prior decisions. The Supreme Court has not ruled upon the subject since 1958 and

should therefore grant certiorari to promote uniform application of the Jones Act throughout the United States. Just what the term "member of a crew of a vessel" signifies, however, is a question with which the Supreme Court grappled from 1940 until 1958, and which has concerned the circuit courts ever since. See Barrett v. Chevron, Inc., 781 F.2d 1067, 1070 (5th Cir. 1986).

The Supreme Court in its opinions in determining "seaman" status did not place undue weight upon the vessel's "transportation function" nor require plaintiff as a matter of law to make a "significant" contribution to the "transportation function". Rather, this Court has held navigation embraces duties essential for other purposes of the

vessel other than being limited to "putting over the helm."

This Court has historically recognized that various vessels have various functions and that one's status as a seaman must be defined in reference to the vessel upon which he is working when injured. In Norton v. Warner Co., 321 U. S. 565 (1943), this Court addressed the definition found in South Chicago Coal & Dock Company v. Bassett, 309 U.S. 251 (1940) of "crew" as being those "who are naturally and primarily on board" the vessel "to aid in her navigation." The injured party in Norton, was a bargeman whose duties were taking general care of the barge. In finding the injured party to be a member of the "crew" this court stated "certainly members of the crew are not confined to those who can "hand, reef

and steer." 321 U.S. at 572. The Court, observing that vessels have several purposes, ruled:

> "He performed on the barge functions of the same quality as those performed in the maintenance and operation of many vessels. His were indeed different from the functions of any other "crew" only as they were made so by the nature of the vessel and its navigational requirements." 321 U.S. at 572 (emphasis added).

This Court continued to apply a broad interpretation of "seaman." In Gianfala v. Texas Company, 350 U.S. 879 (1955), a member of a drilling crew aboard a submersible drilling barge was killed while unloading drilling pipe onto the barge. At trial, the jury found the plaintiff to be a crew member. The Fifth Circuit Court of Appeals reversed and held that plaintiff was a member of a drilling crew, not as a member of a ship's crew. The Supreme Court, without

discussion, reversed and remanded the case to the District Court to reinstate its judgment. 350 U.S. at 879. Similarly, in Grimes v. Raymond Concrete Pile Co., 356 U.S. 252 (1958), the Court found that a pile driver assisting in the erection of a radar station at sea, might be a seaman. Grimes lived on the tower and kept its equipment in operating condition while it was being towed out to its location at sea. After the tower reached its location and was anchored, the plaintiff, Grimes, performed only pile driving duties. Six days later, he was injured while returning from a trip from a nearby barge to the tower. Grimes contended that he was a member of the crew of the barge. The Court of Appeals held that Grimes was not a crew member as a matter of law. The Supreme Court

reversed without explanation, citing Gianfala and Bassett for the proposition that there was sufficient evidence to send the status issue to the jury.

Finally, in Butler v. Whiteman, 356 U. S. 271 (1950), the decedent was employed as a laborer doing odd jobs around the respondent's wharf. On the date that he died, the decedent was cleaning the boiler of a tug which had been withdrawn from navigation because it was inoperable. It had, on one occasion, been towed to drydock, but during the entire year before and after the decedent's death, the tug had neither a captain nor crew and reported no earnings. Nevertheless, this Court held that the evidence presented a basis for a jury finding that the deceased was a seaman

and a member of the crew of the tug within the meaning of the Jones Act.

In the present case, the trial court found that the nature and purpose of the of the vessel and petitioner's activities were to construct a bridge. It found that his duties, considered in the aggregate, did not primarily serve as an aid to navigation and that he was not primarily engaged in moving the Annapolis or otherwise contributing to the transportation function of the vessel. The trial court found that the petitioner did not meet the definition of a "seaman" as set forth in the three-prong test in Whittington v. Sewer Construction Co., 541 F.2d 427, 436 (4th Cir. 1976).

The Court in Whittington held that a worker must be a member of a crew of a vessel in navigable waters to be a

"seaman" under the Jones Act, and identified three requirements for a worker to be considered a "a member of the crew: (1) the worker must be more or less permanently attached to a vessel or fleet; (2) the worker must be one whose duties serve naturally and primarily as an aid to navigation in the broadest sense (term defined in Lawrence v. Norfolk discussed infra at page 16); and (3) the vessel must be in navigation. The Court of Appeals for the Fourth Circuit affirmed the trial court's decision stating that plaintiff failed to present evidence that he was a seaman within the test set forth in Whittington. However, the Whittington test was not properly applied because the trial court required that petitioner assist in the transportation function of the vessel.

Thus, the Court of Appeals in affirming the trial court's decision, injected a "transportation function" into the test.

The trial court in its opinion rejected the prior Fourth Circuit cases, (A-17), of Lewis v. Roland E. Trego & Sons, 501 F.2d 372 (4th Cir. 1974), Biggs v. Norfolk Dredging Co., 360 F.2d 360 (4th Cir. 1966), and Summerlin v. Massman Construction Co., 199 F.2d 715 (4th Cir. 1952). The trial court stated that all these cases were decided before the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act, and indicated that these cases were no longer controlling. Thus, the trial court implicated that the 1972 amendments changed the test to be applied in determining who is a seamen or member of the crew for coverage under the Jones

Act, but did not elaborate on this aspect.

The Court of Appeals for the Fourth Circuit indicated in Jeffrey v. Henderson Brothers, 193 F.2d 589 (4th Cir. 1951) that the Jones Act covers all persons employed to serve in any capacity on a vessel. Likewise, in Lawrence v. Norfolk Dredging Company, 319 F.2d 805 (4th Cir. 1963), the Court of Appeals stated that "navigation in the broadest sense" is not confined strictly to the actual navigation or movement of the vessel but embraces duties essential for other purposes of the vessel and that a person who contributes to the labor about the operation and welfare of this vessel when it is upon a voyage engaged in navigation and must be considered a member of the crew. In Lewis v. Roland E. Trego & Sons,

501 F.2d 372 (4th Cir. 1974), the Court of Appeals held that one who works abroad a ship in navigation usually considered to be a seaman if his duties are essential to some purpose of the vessel.

The standard announced by the Fourth Circuit in this case is not consistent with the Supreme Court decisions cited above, and deprives petitioner of his right under the Jones Act for a jury determination of his status. These Supreme Court cases indicate that coverage is extended to those who work to further the purpose or function of that vessel. The plaintiffs in Gianfala and Grimes were both, like petitioner, aboard vessels designed for special purposes and their duties, like petitioner's, were directed solely toward the special purpose of the vessel. The plaintiffs in

Gianfala and Grimes, however, were held to be seamen and thus entitled to recovery under the Jones Act. In emphasizing the transportation function of the vessel, the Fourth Circuit has focused on the Supreme Court's early pronouncement that seamen are those aboard "primarily to aid in navigation." See South Chicago Coal & Dock Co. v. Bassett, 309 U.S. 251 (1940). This, however, disregards the other decisions of the Supreme Court, and its later pronouncements, which clearly indicate that persons who contribute to the operation and welfare of the vessel are entitled to recovery under the Jones Act. See Norton v. Warner Co., 321 U.S. 521 (1944). The narrow definition of seamen or member of the crew adopted by the Fourth Circuit also conflicts with other

Federal Circuits in determining coverage under the Jones Act. The federal courts have taken two different approaches in determining seaman status.

In Offshore Company v. Robinson, 266 F.2d 769 (5th Cir. 1959), the Fifth Circuit Court of Appeals, relying on the liberal policy of protection underlying the Jones Act, held that a person was covered by the Act "if the capacity in which he was employed or the duties which he performed contributed to the function of the vessel or to the accomplishment of its mission." Robinson, 266 F.2d at 779. The test announced in Robinson does not include an "aid to navigation" requirement.

The Seventh Circuit Court of Appeals, acknowledging its departure from the criteria developed by the Fifth Circuit

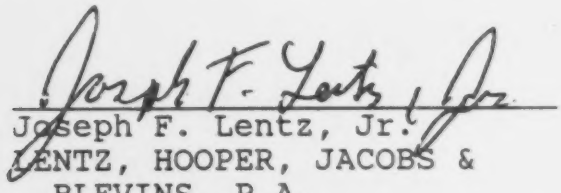
in Robinson, adopted a more restrictive test, similar to that used by the Fourth Circuit in the instant case. In Johnson v. John F. Beasley Construction Co., 742 F.2d 1054 (7th Cir. 1984), the Seventh Circuit announced for one to be covered under the Jones Act requires that "the person injured made a significant contribution to the maintenance, operation or welfare of the transportation function of the vessel." 742 F.2d at 1062.

In keeping with the remedial purpose of the Jones Act, the Act should be and has been interpreted broadly. The test announced by the Fourth Circuit requiring a "transportation function" is not consistent with opinions from this court, and injured seaman in the Fourth Circuit cannot be afforded less protection than

seaman injured in the rest of the country, and the 1972 amendments to the Longshoremen and Harbor Worker's Act did not change the test in determining seamen or member of the crew status under the Jones Act.

CONCLUSION

For the foregoing reasons, Petitioner respectfully prays that a Writ of Certiorari should be granted in this case to promote the uniform application of the Jones Act throughout the United States.



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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 88-2805

WILLIAM E. STEPHENSON,

Plaintiff-Appellant,

versus

McLEAN CONTRACTING COMPANY, INC.,

Defendant-Appellee

Appeal from the United States District Court for the District of Maryland at Baltimore. J. Frederick Motz, District Judge. (CA-87-587-JFM)

Argued
November 2, 1988

Decided
December 23, 1988

Before WINTER, Chief Judge, and WIDENER and MURNAGHAN, Circuit Judges.

Joseph Francis Lentz, Jr., for Appellant. Thomas G. Young, III (William F. Ryan, Jr., Kathleen M. Boucher, WHITEFORD, TAYLOR & PRESTON, on brief) for Appellee.

PER CURIAM:

William E. Stephenson appeals a district court order finding that he has no viable claim under the Jones Act, 46 U.S.C. Section 688(a), or under the maritime doctrine of unseaworthiness for an injury which he incurred while constructing a bridge over the Choptank River in Maryland. The district court granted the defendant's motion for summary judgment on the ground that the plaintiff, Stephenson, did not meet the definition of a "seaman" as set forth in the three-prong test in Whittington v. Sewer Construction Co., 541 F.2d 427, 436 (4th Cir. 1976), as well as because the cofferdam in which plaintiff was injured was not part of a vessel. We affirm.

Stephenson was an employee of the McLean Contracting Co. He was regularly

assigned to work on and off the Annapolis, a crane barge which was being used as a work platform to construct the columns which would support the bridge's span. At the time of his injury on March 26, 1986, Stephenson was using a cutting torch on pilings of a cofferdam alongside the Newport News, another crane barge owned and used by McLean Contracting in the bridge project. While walking on a beam, Stephenson slipped on some loose gravel and fell to the bottom of the cofferdam, sustaining injuries for which he sues.

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1 The cofferdam here was a box-like structure, from which water might be excluded, surrounding a foundation embedded in the river bottom. It was constructed to temporarily keep the river's water from the work area.

The Jones Act, 46 U.S.C. Section 688(a), states in part:

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury. . . . . .

To recover under the Act, a worker must prove he is a "seaman" within the meaning of the statute. This court set out a three-prong test for determining whether a worker is a seaman in Whittington v. Sewer Construction Co., 541 F.2d at 436.

In Whittington, the plaintiff claimed he worked as deck hand and seaman aboard a barge moored in the Elk River in Kanawha County, West Virginia. The barge was being used in a bridge demolition project and was moored in the river beneath a twelve-foot-square hole cut in the bridge. As the bridge was

dismantled, the scrap was lowered through the hole and onto the barge. Whittington was injured when he fell while being lowered on a cable from the bridge to the barge.

The court in Whittington held that a worker must be a member of a crew of a vessel in the navigable waters to be a "seaman" under the coverage of the Jones Act. Id. The court identified three requirements for a worker to be considered "a member of the crew": 1) the worker must be more or less permanently attached to a vessel or fleet; 2) the worker must be one whose duties serve naturally and primarily as an aid to navigation in the broadest sense; and 3) the vessel must be in navigation. Id. We agreed Whittington was not a seaman and could not recover

under the Jones Act, and we think Whittington is controlling in the present case.

For the purpose of ruling on the summary judgment motion in the case before us, the district court assumed that Stephenson was permanently attached to the Annapolis an that the Annapolis was in navigation. Thus, we need not consider these questions. What is at issue in this case is the district court's determination that Stephenson did not meet the second prong of the Whittington test, that his duties did not serve naturally and primarily as an aid to navigation.

The district court found that while Stephenson described himself as a deck hand, the nature and purpose of his activities were to construct a bridge.

It found that his duties, considered in the aggregate, did not primarily serve as an aid to navigation and that he was not primarily engaged in moving the Annapolis or otherwise contributing to the transportation function of the vessel. Neither, the district found, was he indirectly contributing to the vessel's navigational functions by providing support services to those who were performing them. Although the district court gave Stephenson the benefit of the doubt by denying defendant's pre-trial motion for summary judgment and allowing the case to go to trial, upon the development of the evidence, after two days of testimony, that Stephenson performed a variety of duties, including welding, cutting off piling, construction on the framework for the bridge, riding

concrete buckets and assisting in the pouring of the concrete, it was apparent to the district court, as it found, that it was only incidental to the tasks of a bridge construction worker that the plaintiff performed any function relating to the transportation of the Annapolis. These facts, as found by the district court, are not refuted by the record, and we think it is clear that the duties of Stephenson did not "serve naturally and primarily as an aid to navigation in the broadest sense." Whittington, 541 F.2d at 436.

We thus agree with the district court that the plaintiff failed to present evidence that he was a seaman within the test set forth in Whittington, and that there was no genuine issue of material fact to go to the jury. Such judgment is

proper where it is quite clear what the truth is. See Poller v. Columbia Broadcasting System, Inc., 368. U. S. 464, 467 (1962).

We also agree with the district court that Stephenson's unseaworthiness claim is without merit. To recover under the maritime doctrine of unseaworthiness, a worker must show that he was "doing the work of a seaman" and that his injury was caused by an unseaworthy appurtenance of a vessel in navigable waters. Whittington, 541 F.2d at 434. At the time of Stephenson's injury he was doing the work of a bridge construction worker, not a seaman. Further, he was working in a cofferdam, an independent work site, not on any part of the vessel. See Whittington, 541 F.2d at 433.

The judgment of the district court is accordingly

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

WILLIAM E. STEPHENSON *

v. *

McLEAN CONTRACTING CO., INC. *

* * * * * * * * * *

MEMORANDUM

This is an action brought by William E. Stephenson for injuries which he sustained while working for McLean Contracting Company, Inc. on a bridge construction project on the Choptank River. Plaintiff asserts claims under the Jones Act and under the maritime doctrine of unseaworthiness. 1

The case has had a somewhat unusual procedural history. Defendant filed a timely motion for summary judgment, contending, inter alia, that plaintiff is

not a "seaman" entitled to assert Jones Act and unseaworthiness claims. Upon reviewing the memoranda which had been submitted, this Court - while noting that it had substantial doubts concerning the viability of plaintiff's claims - concluded that it could not rule on the record as it was then established that plaintiff was not a seaman. Accordingly, it denied the defendant's motion. On April 11, 1988, trial began. After hearing two days of testimony, this Court concluded that plaintiff was

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1 Several days before trial plaintiff submitted a proposed amendment to the pretrial order attempting to assert a claim for maintenance and cure. This court denied plaintiff leave to assert such a claim because of its extreme untimeliness. It would undermine the purposes of Fed. R. Civ. P. 16 to allow a party to bring an entirely new claim on the very eve of trial after a pretrial conference has been held.

himself proving that he was not a seaman and, after taking a proffer from plaintiff's counsel supplementing the summary judgment record, the Court decided to reverse its prior ruling and grant defendant's summary judgment motion. Having made this decision, the Court dismissed the jury and stated that this memorandum would be forthcoming.

Plaintiff was regularly assigned to work on and off the ANNAPOLIS, a crane barge being used as a work platform in connection with the construction of columns supporting the bridge's span. Like similar barges, the ANNAPOLIS is not self propelled but can be moved from one work station to another along the length of its anchor lines. At the time of his injury plaintiff was doing welding work on pilings, not aboard the ANNAPOLIS but

in a cofferdam, a box-like work structure surrounding a concrete foundation embedded in the river bottom.

Plaintiff describes his job for defendant as having been one of a "deckhand" on the ANNAPOLIS. In initially ruling upon defendant's summary judgment motion, this Court was unclear as to what plaintiff meant by this term and, giving plaintiff the benefit of all doubt, inferred that the plaintiff was claiming that his primary duties at the project site were to assist in transporting men and material in small craft to and from the ANNAPOLIS, to handle lines on the ANNAPOLIS, to assist

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2 On the day of the accident plaintiff had been temporarily assigned to another crane barge, the NEWPORT NEWS, and the cofferdam in which he was working was adjacent to the NEWPORT NEWS. That fact is not dispositive of the issues here presented.

in moving the ANNAPOLIS along its anchor lines and otherwise to participate in transportation functions incident to the ANNAPOLIS' operation. At trial it became clear that this is not plaintiff's position at all. Rather, it is his position that he was a "deckhand" only in the sense that he, like the other men assigned to the ANNAPOLIS, was furthering the purpose of the crane barge: constructing a bridge. To that end, he performed a variety of duties, including

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3 Since the time that the trial was aborted, the Court has re-read the factual portion of plaintiff's summary judgment memorandum. Plaintiff's use or conclusory terms and its selective citation of deposition transcripts suggest that plaintiff was inviting the inference which this Court drew.

welding, cutting off piling, constructing falsework for the bridge, riding concrete buckets and assisting in the pouring of concrete and the like. It was only incidental to these duties - the tasks of a bridge construction worker - that plaintiff performed any function relating to the ANNAPOLIS.

Under Fourth Circuit law there is a three-pronged test for determining whether a worker is a "seaman:" (1) whether he is "more or less permanently attached to a vessel or fleet;" (2) whether the vessel or fleet is "in navigation;" and (3) whether his "duties serve `naturally and primarily as an aid to navigation' in the broadest sense." Whittington v. Sewer Construction Co., 541 F.2d 427, 436 (4th Cir. 1976) (footnotes omitted); cf. Johnson v. John

F. Beasley Construction Co., 742 F.2d 1054, 1063 (7th Cir. 1984), cert. denied, 469 U. S. 1211 (1985). For the purpose of ruling upon this motion, this Court assumes that the plaintiff was permanently attached to the ANNAPOLIS and that the ANNAPOLIS was in navigation. On the third prong of the test, plaintiff's case fails.

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4 As to the requirement that a vessel be in navigation, this Court has previously ruled that a crane barge like the ANNAPOLIS which is being used for a land-based construction project and which is capable of movement only along its own anchor lines is not "in navigation." See Presley v. Healy Tibbits Construction Co., 646 F.Supp. 203, 206 (D.Md. 1986). The theory of that holding was that, in order to be "in navigation," a vessel must be performing the function of transporting people or things in commerce. Since this Court also held in Presley that plaintiff's duties were not primarily in aid of navigation, its ruling that the crane barge was not in navigation was not necessary to its decision. It may also have been erroneous. See Johnson, supra, at 1063.

Although he may not have been primarily a welder (as argued by defendant), his duties considered in the aggregate, did not primarily serve as an aid to navigation. He was not primarily engaged in moving the ANNAPOLIS or otherwise contributing to a transportation function of the barge.

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5 This court need not reach here the question of whether a worker aboard a dredge who is not directly engaged primarily in transportation functions nevertheless has duties primarily in aid of navigation since the opening of sea channels is itself in aid of navigation. Cf. Presley, supra, at 206.

Nor was he indirectly contributing to the vessel's functions by providing support services to those who were performing them. Rather, the nature and purpose of his activities were to construct a bridge, a job not in aid of navigation.

Plaintiff relies upon Lewis v. Roland E. Tregon & Sons, 501 F.2d 372 (4th Cir. 1974), Biggs v. Norfolk Dredging Co., 360 F.2d 360 (4th Cir. 1966), and Summerlin v. Massman Construction co., 199 F.2d 715 (4th Cir. 1952), in which the Fourth Circuit held that a general laborer on a pile driver and barges, a construction laborer putting on caps on bridge piles and a crane fireman on a barge building a bridge were, respectively, seaman. These cases were all decided before the 1972 amendments to

the Longshoremen's and Harbor Workers' Compensation Act, which extended federal compensation benefits to various harbor workers and drew a clear distinction between harbor workers on the one hand, and seaman, on the other. See

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6 In Lewis the finding of seaman status was made in connection with an unseaworthiness claim. Plaintiff was found not to be entitled to a Jones Act remedy because he was not permanently assigned to a vessel in navigation.

Johnson, supra, at 1062; Presley, supra, at 205. Moreover, they all predate Whittington and the three-pronged test which it establishes.

For these reasons the Court finds that plaintiff is not a seaman and that he therefore has no viable claim under the Jones Act or under the maritime doctrine of unseaworthiness. It should also be noted, in regard to plaintiff's unseaworthiness claim, that it is undisputed that the cofferdam in which he was working at that time that he was injured was not part of any vessel, but was an independent work site at which a crane barge was working. Plaintiff has cited no cases to support an unseaworthiness claim under such circumstances.

A separate order granting defendant's

motion for summary judgment is being entered herewith.

Date: APR 2 0 1988

J. Frederick Motz
United States District Court

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

Filed

No. 88-2805 2/2/89

WILLIAM E. STEPHENSON,

Plaintiff-Appellant

versus

McLEAN CONTRACTING COMPANY, INC.

Defendant-Appellee

O R D E R

It is ORDERED that the motion of appellant for enlargement of time to file his petition for rehearing en banc is granted, and the same is filed.

There having been no request for a poll of the court on the petition for rehearing en banc, it is ADJUDGED and

ORDERED that the petition shall be, and it hereby is, denied.

The panel has considered the petition for rehearing and is of opinion it is without merit. It is accordingly ADJUDGED and ORDERED that the petition for rehearing shall be, and the same hereby is, denied.

We have also considered the motion to recall the mandate and are of opinion it is without merit. It is accordingly ADJUDGED and ORDERED that the motion to recall the mandate shall be, and it hereby is denied.

With concurrences of Judge Winter and Judge Murnaghan.

/s/ H. E. Widener, Jr.

For the Court

A True Copy Tests:

John M. Greason, Clerk

By:_____
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No. 88-1643

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

WILLIAM E. STEPHENSON,

Petitioner,

v.

McLEAN CONTRACTING COMPANY, INCORPORATED,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I. QUESTION PRESENTED FOR REVIEW

Did the Circuit Court of Appeals correctly sustain the holding of the District Court that Petitioner was not a seaman under the Jones Act as a matter of law?

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IV. CITATION TO OPINION BELOW

The citation of the Fourth Circuit decision below is:

Stephenson v. McLean Contracting Company, Inc., 863 F.2d 340 (4th Cir. 1988).

No. 88-1643

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V. STATEMENT OF THE CASE

Respondent, McLean Contracting Company, Inc., is a contractor specializing in heavy construction. Respondent was awarded the contract to build the struts, piers and a portion of the roadway of a bridge spanning the Choptank River in Maryland, involving work on land and on the river itself. Petitioner, William E. Stephenson, was hired by Respondent as a licensed welder. When he was hired, Petitioner was informed that he would be assigned work on and off a crane barge as a welder, but that he would be expected to perform other tasks related to the bridge construction as needed.

Petitioner was assigned to the crane barge "Annapolis" which was engaged in constructing the bridge struts and piers.

During the nine months he worked on the bridge prior to his accident, Petitioner spent about fifty percent (50%) of his time in welding activities, and the bulk of the remainder marking and moving bridge support pilings, pouring concrete, building false-work, placing reinforcing steel, assisting in pile driving and other construction activities. From time to time, Petitioner, who is not a licensed seaman, would assist in handling barge and push-boat lines bringing construction materials to the job site, and occasionally hooking up the anchor buoys to the crane boom or setting lights to mark the stationary barge at night, or to illuminate the site for night work.

On the day of the accident, Petitioner was ordered to the crane barge "Newport

News", similar to but smaller than the "Annapolis", which was tied along side a cofferdam. The cofferdam consisted of four steel sides driven into the river bottom, forming a water-tight box, from which the water had been pumped exposing the bed of the river, on which concrete had been poured forming a solid surface.

Petitioner left the "Newport News", and entered the cofferdam in order to use his welding torch to cut steel pilings off at a particular height. Petitioner was walking along a horizontal beam inside the cofferdam when he slipped and fell to the concrete river bottom sustaining injury.

Petitioner received compensation benefits, and then filed suit in the United States District Court for the District of Maryland under the Jones Act, and for

unseaworthiness. After extensive discovery Respondent filed a motion for summary judgment on all issues on the ground that as a matter of law, neither the cofferdam nor the crane barge moored alongside were vessels in navigation, that Petitioner's duties were not primarily and naturally in aid of navigation, that he was not permanently attached to any vessel, that the unseaworthiness of no vessel caused or contributed to the accident nor was Petitioner performing a seaman's work when injured, and that therefore, Petitioner's sole remedy is worker's compensation, either state or federal. The motion and opposition contained voluminous citations to discovery.

The District Court denied the motion and trial commenced. After two days of testi-

mony in Petitioner's case, the District Judge suspended the proceedings and granted Respondent's motion on all counts. In ruling on the Jones Act issue, the District Judge expressly assumed without deciding that Petitioner was permanently attached to a vessel in navigation, but ruled that his duties were not in aid of navigation in the broadest sense.

Appeal was taken by Petitioner to the Fourth Circuit Court of Appeals on the Jones Act and unseaworthiness issues. Petitioner's Petition to this Court followed the Court of Appeals opinion sustaining the judgment of the District Court. Petitioner's Petition does not preserve any issue relating to the lower court's rulings on unseaworthiness.

VI - SUMMARY OF ARGUMENT

The decision of the Fourth Circuit correctly affirmed the District Court's granting of Summary Judgment for Respondent on the ground that Petitioner had failed to prove facts sufficient to permit a jury to conclude that he was a seaman for Jones Act purposes. Petitioner's deposition and testimony clearly showed that he was a construction worker on a bridge construction project and that duties, such as handling lines or moving anchors, were purely incidental. The District Court applied the Fourth Circuit's three prong test and assumed that Petitioner was permanently assigned to a vessel in navigation, thereby meeting two prongs of the test.

The third prong, duties serving primarily to aid in navigation in its

broadest sense, which Petitioner failed to meet, looks to aiding the transportation function of the vessel.

The decision below is in accord with the decisions of this Court, which have continually affirmed the requirement for seaman status that job duties naturally and primarily aid in navigation in a broad sense. Looking at the transportation function of the vessel broadens the test beyond traditional seaman duties.

The Fourth and Seventh Circuits have adopted this broad test and although the Fifth Circuit has adopted a somewhat more lax test, the facts of this case mandate the same result under any of the tests so that no conflict among the Circuits is presented.

Petitioner's other issues do not present proper grounds for review.

VII - ARGUMENT

A. THE GROUNDS FOR REVIEW PRESENTED BY PETITIONER

Our reading of the Petition suggests that Petitioner asserts four grounds for the granting of the Petition (Petition at 3-4):

(1) The opinion below conflicts with prior decisions of this Court; (2) the opinion below conflicts with decisions of other Courts of Appeal; (3) there are a large number of persons interested in clarifying Jones Act issues; and (4) the courts need guidance on the effect of the 1972 amendments to the Longshoreman and Harbor Workers Compensation Act, 33 U.S.C. Sections 901, et seq. ("L.H.W.C.A.").

The Rules of this Court set forth examples of grounds upon which the Court may grant a petition for writ of

certiorari, two of which are arguably invoked by Petitioner: first, when there is a conflict among the circuits, Sup. Ct. R.17(a), and second, when a court of appeals has decided a federal question conflicting with decisions of this Court, Sup. Ct. R.17(c). Both grounds will be addressed in this Brief.

The third ground does not present any legal issue supporting granting the Petition, and the fourth ground, relating to the 1972 L.H.W.C.A. amendments, is not expounded upon in the Petition and Petitioner cites no legal error below regarding it. Therefore, these issues will not be addressed.

B. THE DECISION BELOW WAS IN CONFORMITY WITH SETTLED LAW.

1. SUMMARY JUDGMENT IS AN APPROPRIATE MEANS OF DECIDING JONES ACT CASES.

Although the determination of crew member status for Jones Act purposes is dependent largely on the facts, South Chicago Coal & Dock Co. v. Bassett, 309 U.S. 251, 257-9, (1940), Desper v. Starved Rock Ferry Co., 342 U.S. 187, 190, (1952), the discretion allowed the jury or other fact finder is no different than in any other case, and a jury decision must have a reasonable basis. See, Senko v. LaCrosse Dredging Company, 352 U.S. 370, 374, (1957).

In a proper case this Court has sustained reversal of a jury verdict finding Jones Act status on the ground that there were insufficient facts as a matter of law. Desper v. Starved Rock Ferry Co., supra. Summary judgment and related proceedings have become an important way of disposing of Jones Act

cases where the facts are such that a jury ought not be permitted to conclude that seaman status exists. Eg., Barrett v. Chevron, U.S.A., Inc., 781 F.2d 1067 (5th Cir. 1986); Johnson v. John F. Beasley Construction Co., 742 F.2d 1054 (7th Cir. 1984), cert. denied, 469 U.S. 1211 (1985), Whittington v. Sewer Construction Company, Inc., 541 F.2d 427 (4th Cir. 1976); Powers v. Bethlehem Steel Corporation, 477 F.2d 643 (1st. Cir. 1973).

Therefore, the mere fact that the lower court disposed of Petitioner's case on summary judgment is well within established practice.

2. THE TEST APPLIED BY THE COURTS BELOW WAS CORRECT.

a. THE USE OF A NAVIGATIONAL TEST CONFORMS TO THE HOLDINGS OF THIS COURT.

The test developed by the Fourth Circuit Court of Appeals for determining Jones Act status correctly conforms to prior decisions of this Court.

The Fourth Circuit test reached mature form in Whittington v. Sewer Construction Company, supra:

> "To qualify as a 'member of the crew' under the Jones Act one must be more or less permanently attached to a vessel or fleet, he must be one whose duties serve 'naturally and primarily as an aid to navigation' in the broadest sense, and the vessel must be in navigation."
> 541 F.2d. at 436 (footnotes omitted)

The Fourth Circuit, in this case, held Whittington to be controlling, and pointing out that the District Court had assumed that petitioner had satisfied two of the three prongs of the test (permanent attachment to a vessel in navigation), but the remaining (second) prong was at

issue: whether Petitioner's duties served naturally and primarily as an aid to navigation. Stephenson v. McLean Contracting Company, Inc., 863 F.2d 340, 341 (1988).

Therefore, this argument will address only the "naturally and primarily in aid of navigation" portion of the Whittington test (hereinafter, the "navigation test").

The navigation test as applied to Jones Act jurisdiction first finds expression in decisions of this Court in South Chicago Coal & Dock Co. v. Bassett, supra, in which the Court discussed the statutory exclusion under L.H.W.C.A. for a "master or member of a crew of any vessel", 33 U.S.C. § 903(a), and described the kind of crewmember who would be excluded from coverage as "those employees ... who are naturally and primarily on board to aid

in ... navigation". 309 U.S. at 260.

The Bassett test received further elucidation in Norton v. Warner Company, 321 U.S. 565 (1944) where the employee apparently sought to become a crewmember in order to receive the liberal benefits of the Jones Act. The Court cited the Bassett navigation test, and said:

> "But navigation is not limited to 'putting over the helm'. It also embraces duties essential for other purposes of the vessel. Certainly members of the crew are not confined to those who can 'hand, reef and steer'."
> 321 U.S. at 572.

The next full decision on the navigational test is Senko v. LaCrosse Dredging Corporation, supra. That case held that where the injured worker was employed almost solely on a vessel (dredge), with responsibility to maintain it, there was sufficient evidence to go to a jury on seaman status where the worker "would have

a significant navigational function when the dredge was put in transit". 352 U.S. at 374.

Three short per curiam decisions of the Court have been cited as relevant to the navigation test. The first is Gianfala v. Texas Company, 350 U.S. 879, (1955) which reversed a Fifth Circuit decision without comment, citing Bassett and several Circuit Court of Appeals decisions. While the Court did not make clear the basis of its holding, the Fifth Circuit had held below that a case involving undisputed testimony on Jones Act status "presents under this evidence not a question of fact to be determined by a jury, but a question of law to be determined by the judge...". Texas Company v. Gianfala, 222 F.2d 382, 386 (5th Cir. 1955), rev'd per curiam,

Gianfala v. Texas Company, supra. The decision arguably reflects disagreement with a too rigid approach to withdrawing a case from the jury. See, Offshore Company v. Robison, 266 F.2d 769 (1959).

In the second per curiam decision, Grimes v. Raymond Concrete Pile Company, 356 U.S. 252, (1958), the District Court had indicated that the evidence created a fact question on the issue of crewmember status, with which the Court of Appeals disagreed. Citing Senko, Gianfala and Bassett, the Court reversed without discussion, presumably because the District Court had indicated the existence of a factual issue.

In the last per curiam decision, a divided Court held without recitation of facts, that an evidentiary basis existed for a jury to decide whether the tug

involved was in navigation, and then to decide whether the deceased worker was a seaman and whether his death was caused by negligence. Butler v. Whiteman, 356 U.S. 271, (1958). Bassett was cited by the Court in support.

It is clear that the navigational test was not eroded or altered by the Gianfala, Grimes and Butler decisions as has been suggested by the Fifth Circuit in Offshore Company v. Robison, supra, because in a case decided shortly thereafter, Braen v. Pfeifer Oil Transportation Co., 361 U.S. 129 (1959), the Court clearly affirmed the continuation of the navigation test, citing Bassett, Desper, Grimes, Butler as cases supporting the proposition that a determination of navigational duties at the moment of injury may be critical.

Therefore, the navigational test as announced in South Chicago Coal & Dock Co. v. Bassett, supra, and as elucidated in later decisions, continues unabated and was correctly relied on by the courts below in this case.

b. TRANSPORTATION FUNCTION IS A PROPER INGREDIENT OF THE NAVIGATION TEST.

Petitioner complains that the navigation test applied by the Court below incorrectly included reference to the transportation function of the vessel, and while Petitioner seems to feel that the earlier decisions of this Court support such an element, the later decisions do not. (Petition at 18). As we have seen, however, the navigational test has been passed from decision to decision since its inception in Bassett without diminution.

In adopting a navigation test which includes a "transportation function of the vessel" element, the Seventh Circuit in Johnson v. John F. Beasley Construction Company, supra, pointed out that Bassett and Norton emphasized duties tied to the transportation function of the vessel so that the test becomes:

> "Whether the employee contributes to the maintenance, operation or navigation of the vessel as a transport on water, that is critical for Jones Act purposes." 742 F.2d at 1061.

Therefore, the test has broadened considerably beyond the traditional deckhand's duties in accordance with the dictate of Norton v. Warner Company, supra.

The District Court opinion below cited the Johnson case and held that Petitioner not being engaged in contributing to the transportation function of the vessel was

dispositive under the navigation test (Petition at A15-A17), which the Fourth Circuit affirmed. The Fourth and Seventh Circuits are entirely correct in linking seaman status to the transportation function of the vessel, which is a navigational test in the broadest sense and complies fully with the decisions of this Court.

3. SUMMARY JUDGMENT WAS PROPERLY GRANTED IN THIS CASE.

If there are no conflicting facts or conflicting inferences from undisputed facts, then the case can be decided as a matter of law. See, Desper v. Starved Rock Ferry Co., supra. Here, the decisions below were based on Petitioner's own testimony without regard to any conflicting evidence, and any conflicting inferences were resolved in his favor by

giving him the benefit of two of the three prongs of the Fourth Circuit test.

Sometimes the job duties performed by the injured person are crucial to a determination of seaman status, Braen v. Pfeifer Oil Transportation Co., supra, 361 U.S. at 131. Here, Petitioner was performing his usual welding services, not on a vessel, but in a fixed cofferdam forming a dry construction site for a bridge pier. There is nothing maritime about such employment.

In other cases, as Braen points out, a larger view must be taken of the injured person's job duties, because non-maritime employment at the moment of injury will not necessarily destroy seaman status already obtained. Id., 361 U.S. at 132; compare Desper v. Starved Rock Ferry Co., supra. See, Barrett v. Chevron U.S.A.,

Inc., supra, 781 F.2d at 1075.

Unlike in Braen, however, Petitioner had no history of duties which were "naturally and primarily ... to aid in ... navigation ... aside from the incidental task of throwing the ship's rope or making the boat fast, a service of the sort which could readily be performed or aided by a harbor worker". South Chicago Coal & Dock Co.v Bassett, 309 U.S. at 260.

From Petitioner's testimony, the record discloses that the only activity which he was involved in during the nine months of employment before his injury were of the sort just quoted from Bassett and were insufficient as a matter of law to allow a finding of seaman status. Johnson v. John F. Beasley Construction Co., supra; cf. Barrett v. Chevron U.S.A., Inc., supra, 781 F.2d at 1074.

C. THE DECISION BELOW DOES NOT CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEAL.

Petitioner cites decisions of the Fifth and Seventh Circuit Courts of Appeals in support of his argument that this case presents a conflict among the circuits which the Court ought to resolve.

As previously discussed, under the issues presented by this case, the Fourth and Seventh Circuit navigational tests are identical, and the Seventh Circuit would have reached the same result as was reached below. See, Johnson v. John F. Beasley Construction Company, supra (summary judgment affirmed against foreman on bridge construction project injured on a crane barge).

The Fifth Circuit, however, has adopted a more liberal test in Offshore Company v. Robison, supra, recently reaffirmed in

Barrett v. Chevron U.S.A., Inc., 781 F.2d 1067, 1074 (5th Cir. 1986). The Seventh Circuit had earlier criticized the Robison test for weakening the navigational aspect. Johnson v. John F. Beasley Construction Company, supra, 742 F.2d at 1061, and compare Barrett v. Chevron U.S.A., Inc., supra, 781 F. 2d at 1073 and 1076 (concurring opinion).

Even under the Fifth Circuit's weakened navigational test, however, the present facts would require granting summary judgment for Respondent, which, under the Barrett case is required in proper cases. 781 F.2d at 1074.

In Barrett, a welder on various offshore drilling platforms brought suit under the Jones Act. Although seventy percent or more of his time was spent on platforms, not on auxiliary vessels, at

the time of his accident Barrett was performing welding services on a barge next to a fixed caisson tied into the underwater pipeline system. Barrett was injured while being transported to the barge, and later on the barge itself.

Although Barrett deals primarily with the issue of the employee's permanent assignment to a vessel as an element in finding seaman status, the opinion makes it clear that that issue is inextricably bound up with the issue of actual job duties performed:

> "Whether Barrett was a crew member should have been determined in the context of his entire employment as a welder's helper ..."
> 781 F.2d at 1076.

The Fifth Circuit then held that the District Court should have granted summary judgment against Barrett on the issue of Jones Act seaman status.

The present facts would require summary judgment under any of the Fourth, Fifth and Seventh Circuit tests, so that this case presents no conflict among the Circuits requiring resolution by the Court.

D. CONCLUSION

For the reasons advanced herein, McLean Contracting Company, Inc. respectfully requests the Court to deny the Petition for Writ of Certiorari.

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